IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No.

ANTHONY FERRARA,
Petitioner,

vs.

CONNECTICUT FIRE INSURANCE COMPANY AND HAWKEYE-SECURITY INSURANCE COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Anthony Ferrara, respectfully prays that a Writ of Certiorari issue out of this Court to review the final judgment of the United States Court of Appeals for the Eighth Circuit entered June 2, 1960, at which time said Court denied a timely petition for re-hearing on the opinion of said Court filed April 22, 1960.

OPINIONS BELOW.

The opinion of the United States District Court for the Western District of Missouri, Western Division, dated March 25, 1958, is not reported but is set out in the printed record, pages 11-19, and the judgment entry thereon dated April 4, 1958, is set out in the printed record, pages 19-20. On April 22, 1960, the United States Court of Appeals for the Eighth Circuit filed an opinion, which is not yet officially reported but which is set out in the Appendix, *infra*, page A1. 277 F 2d 388

JURISDICTION.

The judgment sought to be reviewed herein was dated and entered April 22, 1960. A timely petition for rehearing was filed by petitioner and the Court below entered an order dated June 2, 1960, denying the petition for rehearing, which is set out in the Appendix, *infra*, page A10.

Jurisdiction is conferred upon this Court by 28 U.S.C., Section 1254(1). [redacted]

QUESTIONS PRESENTED.

1. When Missouri decisions uniformly hold that a criminal conviction may not be considered in a subsequent civil proceeding for the purpose of establishing the truth of the facts upon which it was based, may a Federal Court, in deciding a case involving a Missouri insurance contract, ignore said Missouri decisions?

2. In applying the rule of "*Erie* v. *Tompkins*," is it the function of the Circuit Court of Appeals to draw a fine distinction not suggested by the decisions of the

state court relative to the admissibility of evidence of a criminal conviction to prove the facts upon which that conviction was based, by making a different application of the law in cases where an action was brought by the criminal defendant, rather than against him?

3. In deciding an issue of fact, is a Federal Court bound by the persuasiveness of the evidence before it, or may it consider a decision by a state court upon an issue of fact?

STATEMENT OF THE CASE.

Plaintiffs (respondents) sued in the United States District Court seeking a Declaratory Judgment to determine their liability under insurance policies which they had issued in favor of the defendant (petitioner) (R. 1), to which action the defendant filed his answer and counterclaim demanding payment under said policies (R. 5). In the interim the defendant filed suit on said policies against the insurance companies in the state court, which suit was removed to the United States District Court and by agreement of the parties the actions were consolidated (R. 10).

The jurisdiction of the Federal District Court was invoked because of diversity of citizenship and the amount involved.

The District Court, sitting without a jury, found for the insured (petitioner) and entered a judgment against each insurance company in the amount of $5,000.00, plus interest and costs (R. 11) (R. 19), from which an appeal was taken by the insurance companies (R. 68).

The insured property consisted of a fruit and grocery market in Kansas City, Missouri, which was destroyed by

fire. The insurance companies sought to avoid liability on the theory that the insured had wilfully set fire to the insured property and swore falsely as to values allegedly in violation of the policies. After full presentation of the evidence, the trial court found against the insurance companies on both issues and entered judgment for the insured (R. 11) (R. 19).

At the trial it developed that the insured had been convicted of arson by the State Court, which conviction was pending on appeal to the state appellate court. The insurance companies offered such evidence only for the purpose of proving "the fact of such conviction," and no express offer was made to prove by the Record of such conviction the facts upon which said conviction was based (R. 30).

Subsequent to the entry of judgment and filing notice of appeal, the insured's criminal conviction was affirmed by the Missouri Supreme Court. *State* v. *Ferrara*, Mo., 958, 320 S.W.2d 540. Thereupon the insurance companies petitioned the District Court to vacate the judgment (R. 20). In overruling the motion to vacate, the District Court found that it was at all times aware of the insureds conviction by the state court, but that in accordance with the facts presented to the Federal District Court it was forced to find and conclude that there was no evidence of arson or false swearing; the Court further found that it was bound by decisions of state courts as to matters of law, but the facts upon which the Federal Court bases its conclusions are not subject to interpretation by the State Court (R. 24). No appeal was taken from said order.

The Court of Appeals reversed the judgment appealed from. The Court of Appeals based its ruling on the evidence allegedly adduced at the criminal proceedings, as recited in the opinion of the Missouri Supreme Court in

State v. *Ferrara, supra*, notwithstanding the fact that such evidence was not before the Federal Court and was not part of the record on appeal (App. A9).

The Court of Appeals also stated in its opinion that the Courts of Missouri have uniformly held that a criminal judgment may not be considered in a subsequent civil proceeding for the purpose of establishing the truth of the facts upon which the conviction was based (App. A3). The Court of Appeals thereupon held the Missouri rule to be enforceable in Federal Courts. In recognizing the Missouri rule regarding the admissibility of the evidence in question, the opinion indicates said rule should be followed by the Federal Courts in actions brought against, but not in actions brought by, litigants.

REASONS FOR GRANTING THE WRIT.

1. The Court below based its decision on findings of facts not admissible under Missouri law and in conflict with the opinion of this Court in the case of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487 (App. A4). Said decision of the Court below is further based upon findings of fact extracted from the decision in the case of *State* v. *Ferrara*, Mo. 1958, 320 S.W.2d 540, which facts were not before the District Court, nor contained in the record on appeal (App. A9). The opinion of the Court below, in citing *Sklebar* v. *Downey*, St. Louis App. 1926, 285 S.W. 148, and other cases, conceded that the courts of Missouri have uniformly held that a criminal judgment may not be considered in a subsequent civil proceeding for the purpose of establishing the truth of the facts upon which it was based (App. A3).

Thus it is clearly evident that under this well established Missouri rule, the Federal Court in these proceedings should not have received in evidence the fact of petitioner's prior conviction in the state court for the purpose of proving the facts upon which that conviction was based. The Court below therefore should not have considered such convictions under the rule set down by this Court in *Erie R. Co.* v. *Tompkins, supra,* and in many other subsequent decisions.

The Court below then proceeded to rule this case on non-Missouri decisions. We submit that said action by the Court below is improper. The Court should have applied the substantive law of Missouri on the subject of introduction of evidence relating to prior convictions, without consideration of the decisions from other jurisdictions. The opinion of the Court below therefore is in conflict with the decisions of this Court, as afore pointed out.

2. The Court below attempted to justify its disregard of the substantive law of Missouri by drawing distinctions between actions brought by and against a litigant (App. A4).

This Court has not heretofore passed on the subject as to whether or not rules of evidence should vary according to the status of the litigant. It seems unreasonable that a person seeking to retain property should be afforded greater rights and privileges by the Courts than a person seeking to recover the same property. Should there be a distinction in the law, as determined by the Court below, as to the rights of parties where in one instance the party brings the action and in the other instance the action is brought against him?

In *Campbell* v. *Maine Central Transportation Company*, 20 F.R.D. 629 (l.c. 630), in applying the rule of *Erie R. Co.* v. *Tompkins*, *supra*, the court held that it is not the function of federal courts to draw fine distinctions not suggested by the state court decisions in interpreting the state laws; in none of the Missouri decisions can there be found a distinction respecting the admissibility of evidence based upon whether an action was brought by or against the litigant, such as has been attempted here by the Court below. The opinion of the Court below opens up an entirely new concept of law regarding the admissibility of evidence, and is of such paramount importance that the subject should definitely be ruled upon by this Court.

3. The opinion of the Court below fails to cite any evidence from the record which would in any way indicate that the judgment of the District Court was contrary to the weight of the evidence.

The record clearly establishes that the trial judge knew that the insured had been convicted by the state court, but there was no evidence before the Court below respecting the facts upon which that conviction was based. After the trial judge was advised of the insured's state court conviction, the insurance companies offered to introduce the record of the State Court conviction, which offer was clearly surplusage and repetition. This offer was limited to proving the fact of conviction and not the facts upon which that conviction was based and merely was directed to the credibility of the witness (R. 30). The Court below therefore was without authority to go outside of the record and consider the mere fact of a conviction as establishing any facts upon which that conviction was based.

Any consideration by the Court below of the facts upon which the state court conviction was based is con-

trary to Missouri decisions and in violation of the rulings of this Court in *Erie R. Co.* v. *Tompkins, supra.*

It is apparent from the opinion of the Court below that said opinion was based upon evidence adduced in the state court case taken out of context from the opinion of the Missouri Supreme Court in *State* v. *Ferrara, supra,* rather than from the record in the case at bar.

The Court below in its opinion expressly held that the judgment of the state court could not be attacked and clearly established its reliance upon the findings of fact in the opinion in the state case in which the parties and facts in evidence are different.

The Court below stated "that any conclusion of the finder of fact, having been apprized of this conviction, that the fire was not due to the act and design of the insured would be unsupported by substantial evidence and would demand reversal (App. A9)".

Such conclusion of the Court below in effect holds that the mere evidence of the fact of conviction in a separate state court case must be accepted as conclusive proof of the facts upon which that conviction was based when considered in a subsequent civil action in Federal Court. Such ruling is contrary to the substantive law of Missouri *supra,* as well as the substantive law of a majority of the states.

In *Travelers Insurance Company of Hartford* v. *Childs,* 252 F.2d 889 (l.c. 890) (C.C.A. 2), the Court properly held that a decision by a state court upon an issue of fact is not authoritative as a precedent upon an analogous issue in a Federal Court, but to the contrary the Federal Court must "decide such issues according to its individual estimate of the persuasiveness of the issue before it."

On the situation presented herein, petitioner has found no reported authority contra to the Second Circuit's ruling in the *Travelers Insurance Co. of Hartford* v. *Childs* case, *supra*, with which the Eighth Circuit's ruling herein is in irreconcilable conflict. The decision of the court below in considering findings and conclusions of fact in a reported state court decision has so far departed from the accepted and usual course of judicial proceedings and involves an issue of such paramount importance that this Court should exercise its power of supervision in clarifying this issue.

CONCLUSION.

The questions presented herein involve important questions of federal law which should be settled by this Court.

If the Court should determine that the opinion of the Circuit Court of Appeals is not in conflict with the decisions of this Court or with the foregoing decision of the Court of Appeals for the Second Circuit, as contended by petitioner herein, then in such event the Court of Appeals has ruled on important questions of Federal law which have not been, but should be, settled by this Court; the decision of the Court below has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision; and for all of the foregoing reasons herein presented, the writ of certiorari should issue.

Respectfully submitted,

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Kansas City, Missouri,
Attorneys for Petitioner.

CERTIFICATE.

Joseph S. Levy, one of the attorneys for the petitioner, and a member of the bar of this Court, hereby certifies that a true and correct copy of the foregoing petition for Writ of Certiorari, has this 29 day of August, 1960, been served on Messrs. Glenn E. McCann, Knipmeyer, Milligan, McCann & Millett, 900 Waltower Building, Kansas City, Missouri, attorneys of record for respondents, by depositing the same in the United States Post Office or mail box with first class postage prepaid, properly addressed, in strict compliance with Supreme Court Rule 33.

JOSEPH S. LEVY.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 16,051.

Connecticut Fire Insurance Company and Hawkeye-Security Insurance Company, Appellants,

vs.

Anthony Ferrara, Appellee.

Appeal from the United States District Court for the Western District of Missouri.

[April 22, 1960.]

Before GARDNER, VOGEL AND VAN OOSTERHOUT, Circuit Judges.

VOGEL, Circuit Judge.

Connecticut Fire Insurance Company and Hawkeye-Security Insurance Company, appellants here, brought suit in the federal District Court for the Western District of Missouri seeking a declaration of their liability under two fire insurance policies issued to the appellee, Anthony Ferrara, in the amount of $5,000.00 each. Simultaneously the insured initiated an action in the state court of Mis-

souri to recover the full amount of the policies. The state court action was then removed to the federal court and consolidated for the purposes of trial with the declaratory proceedings. The District Court, sitting without a jury, found for the insured and entered a judgment against each insurance company in the amount of $5,000.00 plus interest and costs, from which result this appeal is taken.

The insured property, consisting of a fruit and grocery market in Kansas City, Missouri, was destroyed by fire on September 21, 1955. The proofs of loss filed by the insured contained the following provision:

> "The said loss did not originate by any act, design or procurement on the part of your insured, or this affiant; nothing has been done by or with the privity or consent of your insured or this affiant, to violate the conditions of the policy, or render it void; no articles are mentioned herein or in annexed schedules but such as were destroyed or damaged at the time of said loss; no property saved has in any manner been concealed, and no attempt to deceive the said company, as to the extent of said loss, has in any manner been made. Any other information that may be required will be furnished and considered a part of this proof."

The policies in question provided that:

> "This entire policy shall be void if, whether before or after a loss, the insured has wilfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto."

The insurance companies maintained that the insured had rendered the policies void in that he had falsely sworn that the fire was not due to any act or design on his part and in that he had fraudulently sworn to the values and

extent of the property damaged. During the course of the trial the insured was asked on cross-examination whether or not on February 14, 1957, he had been convicted in the Circuit Court of Jackson County, Missouri, of the crime of arson in connection with the destruction of the insured premises. An objection to this question was sustained on the grounds that the state court criminal conviction was then on appeal to the Missouri Supreme Court. Thereafter counsel for the insurance companies offered to prove the fact of the conviction, to which the insured's objection was sustained. The District Court then found that, on the basis of the evidence before it, the destruction of the insured premises was not due to the act or design of the insured and that he was guilty of no fraud in valuing the destroyed property.

Subsequent to the entry of judgment and to the filing of the notice of appeal therefrom, the insured's criminal conviction was affirmed by the Missouri Supreme Court, *State* v. *Ferrara*, Mo., 1958, 320 S.W.2d 540. The insurance companies thereupon petitioned the District Court to vacate the judgment and to enter judgment for them or, in the alternative, to reopen the proceedings on the grounds that the affirmance of the conviction constituted newly discovered evidence. Because of the previously filed appeal the motion was denied, the District Court stating:

> "It is the opinion of the court that the question is now one for determination by the Court of Appeals and not this court."

The central issue presented by this appeal is whether or not a criminal conviction may be considered in a subsequent civil proceeding for the purpose of establishing the truth of the facts upon which it was based. The courts of Missouri have uniformly held that a criminal judgment may not be so used. *Sklebar* v. *Downey*, St. Louis App.,

1926, 285 S.W. 148; *Summers* v. *Rutherford*, Springfield App., 1917, 195 S.W. 511; *Myers* v. *Maryland Cas. Co.*, K.C. App., 1907, 101 S.W. 124. The rationale of these and similar rulings of other jurisdictions has been that criminal and civil proceedings differ as to the issues, objects and procedures involved. Additionally, it has been thought that the fact that a judgment of acquittal could not be binding upon the new civil party prevents, upon the principle of mutuality, a converse result having this effect upon the criminal defendant. See, Annotation, 18 A.L.R.2d 1297. It should be noted, however, that each of the Missouri decisions cited involved a civil proceeding brought *against* the criminal defendant to recover damages for the acts previously found unlawful. We believe that the same rule does not and should not apply where the subsequent civil action is brought *by* the criminal defendant for the purpose of profiting from his criminal conduct.

In *Mineo* v. *Eureka Security Fire & Marine Ins. Co.*, Pa., 1956, 125 A.2d 612, the Supreme Court of Pennsylvania held that it was error for the trial court to refuse to admit in evidence in a suit to recover on a fire insurance policy a judgment of conviction against the insured for arson. The court noted that:

> "The tendency is to abandon any general rule of exclusion applicable to all criminal judgments, and to approach the problem from the point of view of the particular judgment of conviction * * * ", 125 A.2d at 616.

and found that a rule permitting admission of a criminal conviction was necessary under the circumstances of the instant case as:

> "This rule is founded upon the public interest which requires that the laws against crime be enforced, and that courts aid no man in any effort he may make

to benefit from his own violation of them. The rule is enforced upon the ground of public policy alone and not out of consideration for the defendant to whom the advantage is incidental.

The insureds have had their day in court with the opportunity to produce their witnesses, to examine and cross-examine witnesses and to appeal from the judgment and to be acquitted unless the evidence established their guilt beyond a reasonable doubt.

To now permit them to recover for the loss which they have been convicted of fraudulently causing would be against public policy. It would tend to destroy the confidence of the public in the efficiency of the courts; it would stir up litigation that would reopen tried issues; it would impress the public with the belief that the results of trials of the gravest nature were so uncertain that the innocent could not escape condemnation; and it would convince the public that the courts themselves have no confidence in the judicial processes." 125 A.2d at 617-618.

Similarly, in *Eagle, Star & British Dominions Ins. Co. v. Heller*, Va., 1927, 140 S.E. 314, the Supreme Court of Virginia recognized a distinction between civil proceedings brought against the criminal defendant and those brought by him to take advantage of his criminal act. In reference to the latter, the court stated:

"It is certainly clear in such cases that the plaintiff who is seeking redress in the civil case for the injury, not having been a party to the criminal prosecution, is not bound by its result. We confess our inability to perceive, however, why the accused person himself should not be held either as bound or affected by the result of the prosecution, if adverse to him. He has had his day in court * * *. (140 S.E. at 316.)

* * *

To permit a recovery under a policy of fire insurance by one who has been convicted of burning the

property insured, would be to disregard the contract, be illogical, would discredit the administration of justice, defy public policy and shock the most unenlightened conscience. To sustain such a judgment would be to encourage and give support to the current thoughtless and carping criticism of the legal procedure, and to justify the jibe that the administration of the law is (the) only remaining legalized lottery." 140 S.E. at 323.

This distinction has been recognized in other jurisdictions. *Austin* v. *United States*, 7 Cir., 1942, 125 F.2d 816; *Rosenberger* v. *Northwestern Mut. Life Ins. Co.*, D.C. Kans., 1959, 176 F. Supp. 379; *Sovereign Camp, W.O.W.* v. *Gunn*, Ala., 1933, 15[illegible] *Sovereign Camp, W.O.W.* v. *Gunn-Murphy*, Ala., [illegible] S. 491; *Fidelity-Phenix Fire Ins. Co.* v. *Miletello*, Colo. 1933, 146 S. 387; *North River Ins. Co.* v. *Wolff* v. *Empl[illegible]*, 1937, 67 P.2d 625, affirmed, 88 P.2d 567; 640; *Schindler* [illegible]loyers' *Fire Ins. Co.*, Ky., 1940, 140 S.W.2d 71; contra, *Smi*[illegible] v. *Royal Ins. Co.*, N.Y. App., 1932, 179 N.E. re *Johnston's* [illegible]ith v. *Dean*, Ark., 1956, 290 S.W.2d 439[1]; *In* rehearing, 262 *Estate*, Ia., 1935, 261 N.W. 908, affirmed on *Ins. Co.*, Minn. N.W. 488; *True* v. *Citizens' Fund Mut. Fire Woodmen of* [illegible]n., 1933, 246 N.W. 474;[2] *Lillie* v. *Modern win* v. *Contin*[illegible] *America*, Neb., 1911, 130 N.W. 1004;[3] *Good-Girard* v. *Ver*[illegible]*ental Cas. Co.*, Okla., 1935, 53 P.2d 241; 666, 670. Ad[illegible]*mont Mut. Fire Ins. Co.*, Vt., 1931, 154 A. leading treatis[illegible]ditionally, it has received the approval of se writers. McCormick, *Law of Evidence*,

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1. Judge [illegible] Holt dissented, claiming that a contrary result would embody [illegible] the "fair and common sense rule". 290 S.W.2d at 441.

2. Charact[illegible]erized by Wigmore as "unsound; this sort of law is a reproach to [illegible] our system". IV *Wigmore* (3rd Ed.), sec. 1341(a), n. 1, p. 673.

3. Charact[illegible]erized by Wigmore as a case which "reveals an instance where [illegible] some of our fundamental law is fundamental nonsense". IV *Wigmore* (3rd Ed.), sec. 1346(a), n. 1, p. 673.

sec. 295, p. 618-619; V *Wigmore* (3rd Ed.) sec. 1671(a), p. 694; A.L.I., *Model Code of Evidence*, Rule 521, p. 280.

It is a basic principle of American jurisprudence that one may not profit from his own crime. See, for example, *N. Y. Mut. Life Ins. Co. v. Armstrong*, 1886, 117 U.S. 591, 600, wherein the United States Supreme Court held that it was error to refuse to receive testimony that one who was the sole owner of an insurance policy at the time of the death of the insured had feloniously caused the death, stating:

> "It would be a reproach to the jurisprudence of the country if one could recover insurance money payable on the death of a party whose life he had feloniously taken. *As well might he recover insurance money upon a building that he had wilfully fired.*" (Emphasis supplied).

The courts of Missouri have unequivocally adopted this rule. *Grose v. Holland*, Mo., 1948, 211 S.W.2d 464, 466; *Hopkins v. Metropolitan Life Ins. Co.*, St. Louis App., 1941, 151 S.W.2d 527, 530; *Perry v. Strawbridge*, Mo., 1908, 108 S.W. 641. Additionally, the Missouri Court of Appeals has inferentially recognized that this policy must prevail over considerations which might otherwise make a criminal conviction inadmissible in a civil proceeding when that proceeding involves an attempt to circumvent that very policy. Thus, in *Osborn v. Gibson*, K.C. App., 1958, 309 S.W.2d 15, the trial court's refusal to admit evidence of a criminal conviction in a civil proceedings was affirmed because the civil action involved an issue not relevant to the criminal judgment. However, the court proceeded to note that:

> "Most of the leading cases approving of the admission, in civil actions, of a previous criminal conviction as evidence of the facts upon which it was based, have

involved situations where the convicted criminal has sought to take advantage of rights growing out of the criminal act. 18 A.L.R. 2d 1300." 309 S.W.2d at 17.

That annotation states, *inter alia*:

"The logical basis for admitting evidence of convictions seems to be the same regardless of the type of conviction or civil action involved, *although the strong public policy rule against permitting one to profit by his own wrong may furnish a more compelling reason for abandoning the previous rule.*" (Emphasis supplied). 18 A.L.R. 2d at 1289-1290.

We therefore conclude that the affirmed conviction of the insured for arson in regard to the destruction of the insured premises may be considered as bearing upon the merits of his claim against the insurance companies.

The next question to be determined is whether or not the fact of the insured's criminal conviction is merely additional evidence to be weighed by the finder of fact in determining the cause of the fire, in which event we would be required to remand this case to the District Court for further proceedings, or is an automatic and conclusive bar to his right to recover. Admittedly, the former effect is the one adopted by the majority of jurisdictions holding that the criminal conviction may be considered in proceedings such as this. *Sovereign Camp, W.O.W.* v. *Gunn, supra; Fidelity-Phenix Fire Ins. Co.* v. *Murphy, supra; North River Ins. Co.* v. *Miletello, supra; Rosenberger* v. *Northwestern Mut. Life Ins. Co., supra; Wolff* v. *Employers' Fire Ins. Co., supra; Schindler* v. *Royal Ins. Co., supra.* Nonetheless, the reasoning of *Austin* v. *United States, supra; Mineo* v. *Eureka Security Fire & Marine Ins Co., supra;* and *Eagle, Star & British Dominions Ins. Co.* v. *Heller, supra,* wherein the criminal conviction was held conclu-

sive of the civil issue, is persuasive for, if public policy demands that a criminal be not allowed to profit by his crime and considering the fact that the criminal judgment was based upon a burden of proof requiring guilt beyond a reasonable doubt, there seems little justification for allowing the civil tribunal to reach a conclusion inconsistent with that policy. The facts of this case are such, however, that it is unnecessary for us to decide this issue. The opinion of the Missouri Supreme Court in *State* v. *Ferrara*, *supra*, reveals clearly that the evidence adduced at the criminal proceeding was fully as complete as that presented in this action. *No basis for a collateral attack on the validity of that judgment appears.* Thus, even accepting the majority rule that a criminal conviction is only additional evidence in a subsequent civil proceeding, *we hold in this case that any conclusion of the finder of fact, having been apprised of this* conviction, *that this fire was not due to the act and design of the insured would be unsupported by substantial evidence and would demand reversal by us.*

The judgment appealed from is reversed with directions to dismiss the suit brought by the insured against the appellants and to grant such further relief as is not inconsistent with this opinion.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT.

September Term, 1959.

No. 16,051.

Connecticut Fire Insurance Company, et al., Appellants, vs. Anthony Ferrara, Appellee.	Appeal from the United States District Court for the Western District of Missouri.

The Court has considered petition for rehearing, filed by appellee, in this cause and is of the opinion that the petition should be, and it is hereby, denied.

June 2, 1960.

FILE COPY

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 367.

ANTHONY FERRARA,
Petitioner,

vs.

CONNECTICUT FIRE INSURANCE COMPANY AND HAWKEYE-SECURITY INSURANCE COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Federal Rules of Civil Procedure, Rule 43(a) 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No. 367.

ANTHONY FERRARA,
Petitioner,

vs.

CONNECTICUT FIRE INSURANCE COMPANY AND HAWKEYE-SECURITY INSURANCE COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

ARGUMENT.

I.

The Appellate Court followed the Substantive Law of Missouri in holding that a criminal may not profit from his own crime in a civil action brought by him and that therefore his prior criminal conviction was admissible in evidence to establish the truth of the facts upon which it is based.

The appellate court based its decision on two principal grounds: (1) That the law of Missouri and the law of the United States does not permit a criminal to profit by his crime in a subsequent civil action by him and (2) that the evidence adduced by the respondents was more complete in the civil case than was the evidence adduced in the criminal case which convicted Ferrara of arson and therefore there was no substantial evidence supporting the decision of the finder of the fact that Ferrara was not guilty of arson (App. A9).

The appellate court was correct in holding that the rule permitting the conviction of the insured to be considered in a subsequent civil action brought by the criminal defendant in order to profit from his crime, is sound and in support of the public policy of Missouri and of the land. To hold otherwise, would be to flaunt justice and right and support the criminal.

This Supreme Court in *Burt* v. *Union Central Ins. Co.*, 187 U.S. 362, 23 S. Ct. 139, 141, 47 L. Ed. 216, held that the criminal conviction was admissible and an adjudication of the insured's guilt. In following the Burt case, the court in *Diamond* v. *New York Life Ins. Co.*, 50 F.2d 884, 887 (C.C.A. 7, 1931), stated:

> "* * * the only question is one of proof. The Burt case is therefore an authoritative and binding holding that the evidence subjected to was competent and relevant."

U. S. v. *Silliman*, 167 F.2d 607, 619 (C.C.A. 3), 1948, also following the Burt case held:

> "* * * We think further, that the public policy of holding parties to one day in court is one which has recently found firm support and sound extension by the court whose authority binds us. * * *"

Hurd v. *Hodge*, 334 U.S. 24, 34-35, 92 L. Ed. 1187, 1195, 68 S. Ct. 847, 853, which states in following the Burt case:

> "* * * The power of the Federal courts to enforce the terms of private agreements is at all times exercised subject to restrictions and limitations of the public policy of the United States and manifested in the construction, treaties, Federal Statutes and applicable legal precedents. Where the enforcement of private agreements would be violative of that policy, it is the obligation of the courts to refrain from such exertions of judicial power".

Austin v. *United States*, 125 F.2d 816 (C.C.A. 7) 1942 also held that a conviction of murder was admissible.

Twentieth Century Fox v. *Lardner*, 216 F.2d 844, 850 (C.C.A. 9) 1954 holds that the record of criminal conviction is the best evidence that a crime was actually committed and is therefore admissible. See also *Emick Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558, 569, 95 L. Ed. 534; 71 S. Ct. 408, Cert. den. 341 U.S. 906, 95 L. Ed. 1345, 71 S. Ct. 610, where this Supreme Court, in holding the criminal conviction of General Motors admissible, stated at page 569:

> "* * * Accordingly, we think plaintiffs are entitled to introduce the prior judgment to establish prima facie all matters of fact and law necessarily decided by the conviction and the verdict on which it was based."

See also *U. S.* v. *Empire Packing Co.*, 174 F.2d 16 (C.C.A. 7) 1949.

Also under Rule 43(a), Federal Rules Civil Procedure, the trial court should have received in evidence the criminal conviction of Anthony Ferrera when offered by the respondents and to consider such conviction in arriving at

its decision. The court, however, refused the offer both during trial and in the after trial motion to vacate.

The appellate court's decision followed the proper substantive law of Missouri that a criminal may not profit from his crime in a subsequent civil action. See *Grose* v. *Holland*, 1948, 211 S.W.2d 464; 466 and cases cited at App. A7. The law of the land does not permit a criminal to profit from his crime. See *New York Mutual Life Insurance Company* v. *Armstrong*, 1886, 117 U.S. 591, 600.

There is no Missouri decision contrary to the rule followed by the appellate court, but such rule has inferentially recognized that public policy must prevail and a criminal conviction is admissible where the criminal attempts to profit by his crime. See *Osborn* v. *Gibson* K. C. Ct. of App., 1958, 309 S.W.2d 15.

Skelgar v. *Downey*, St. L. Ct. of Apps. 1926, 285 S.W. 148 and cases cited at App. A4 are cases where a civil action was brought against the criminal defendant, not by him, to recover damages. The plaintiff there was attempting to recover damages from the criminal defendant for an assault and this is distinguishable from the case where the criminal himself is suing and attempting to profit from his own crime. There is a good and sufficient reason for the admission of the conviction of the criminal in evidence in a case where the criminal is attempting to profit—the reason is public policy. In the *Skelgar* type case, however, *the essential element of public policy* is missing.

The decision of the appellate court was not contrary to *Erie Railroad* v. *Tomkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, for it followed the proper substantive law of the State of Missouri in holding that a criminal cannot profit from his crime and the criminal conviction is admissible.

II.

The decision of the Appellate Court was based on the record before it.

The petitioner erroneously concludes in Reason 3, that the Appellate Court failed to base its holding on the record before it and based it entirely on the criminal conviction. Such is not the case and a review of the record in this case will so disclose.

Evidence of (I) the explosion (R. 14, 39, 46); (II) the violence thereof (R. 39, 43, 46, 52, 54, 55); (III) the quick burning nature of the fire (R. 39, 46, 53, 55, 57); (IV) black carbon smoke from the fire (R. 39, 53); (V) the chemical analysis of the distillate derived from the [illegible] (R. 47-49); (VI) the absence of any gas leaks or natural cause of fire (R. 43, 58, 60, 61, 62) were all proved before the trial court in the civil action as were the same facts in the criminal action.

See *State* v. *Ferrara*, 1958, 320 S.W.2d 540, which has identical facts set out in the opinion of the Missouri Supreme Court.

Certainly this was substantial and poignant evidence that petitioner had committed arson. Thus the finding of the trial court that petitioner had not committed arson was unsupported by substantial evidence and the appellate court so held (App. A9).

The appellate court consequen[illegible] did not go outside the record but made its holding on the facts in evidence and in the record of the civil action before it. It is only a conclusion of the petitioner, not based on fact that the opinion of the appellate court was from "evidence adduced in the state court taken out of context from the opinion of the Missouri Supreme Court in *State* v. *Ferrara* rather than the record

in the case at bar" (Brief 8). Petitioner is in no position to read the mind of the appellate court and blandly state that that court made its decision on evidence outside the record.

Accordingly, the Appellate Court did follow the rule in *Travelers Insurance Company of Hartford* v. *Childs*, 252 F.2d 889 (C.C.A. 2), for it decided the issues according to its individual estimate of the issues and facts before it.

CONCLUSION.

For the foregoing reasons the petition for the writ of certiorari should be denied.

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CERTIFICATE.

I, Glenn E. McCann, one of the attorneys for the Respondents herein, and a member of the Bar of the Supreme Court of the United States hereby certify that on the 22nd day of September, 1960, I served copies of the foregoing Brief of Respondents in opposition to Petition for a Writ of Certiorari of Petitioner by leaving a true and correct copy with Joseph S. Levy, Paul Margolis, Jr., and Bernard D. Craig, 916 Walnut Street Building, Kansas City, Missouri, attorneys of Record for Petitioner in strict compliance with Supreme Court Rule 33.

GLENN E. MCCANN.